

<b>DOCKET</b>	
<b>04-SIT-02</b>	
DATE	<u>OCT 16 2006</u>
RECD.	<u>OCT 16 2006</u>

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:	)	
	)	
Proposed Adoption, Amendment, and Repeal of	)	Docket No. 04-SIT-2
Regulations Governing the Rules of Practice and Site	)	Order No. 04-1006-06
Certification	)	
_____	)	

**LS POWER: COMMENTS ON CEC REGULATIONS:  
PROPOSED REVISIONS DOCKET 04-SIT-02**

October 16, 2006

Audra Hartmann  
Regional Director of Gov't and Regulatory  
Affairs

LS Power Generation, LLC  
980 Ninth Street, Suite 1420  
Sacramento, CA 95814  
ahartmann@lspower.com

LS Power Generation LLC ("LS Power") hereby submit the following comments on the California Energy Commission ("Commission") Staff's proposed revisions to the Commission's siting regulations.

As you may recall, LS Power representatives were present at the Committee's workshop on September 20, 2006. LS Power was pleased by the hard work of the Staff and the meaningful contributions of all of the participants at that workshop. LS Power believes that the Staff listened to the comments of the parties who participated, and based on that process, LS Power believes that the next revision to the Commission's regulations will be a quality work product.

Before moving to some specific comments on this round of proposed revisions to the Commission's siting regulations, we want to provide a little background on LS Power and its interests in California. LS Power was founded in 1990 and has evolved into a fully integrated development, investment and asset management group of companies focused on the power industry. LS Power has more than seventy professionals based in New Jersey, New York, Missouri, California, Florida and Massachusetts. LS Power is recognized as an industry leader, having completed some of the sector's most successful development projects and investments. LS Power's California assets include the Moss Landing modernization project, Morro Bay modernization project, the South Bay Power Plant and Replacement project, and the Oakland Power Plant.

LS Power agrees with, and associates itself with, many of the comments of the parties, as reflected in the workshop transcript. Accordingly, LS Power will not comment on every issue raised in the workshop as we believe that the Staff's next revisions will incorporate the changes we seek.

Nevertheless, LS Power has provided comments on a number of issues, based on the parties' discussions at the workshop, as reflected in the transcript. Those specific comments are attached to this letter as **Attachment 1**. Further, LS Power will take this opportunity to highlight some of the issues of central importance to LS Power as it moves forward with its active development program in California.

In general, LS Power is concerned that many of the proposed changes move significant portions of discovery issues into the data adequacy process. This moving of discovery issues into the data adequacy consideration will slow down the process and make it significantly more difficult to license new generation projects in California. While LS Power does not advocate relaxing the requirements California imposes to site powerplants as those requirements are protective of the environment and result in high quality siting decisions, the Commission should be careful not to add unnecessary hurdles, and, in the worst case, insurmountable obstacles to new projects.

As was discussed at the workshop, the proposed revisions add significantly to the data adequacy requirements of Appendix B. In addition to requiring significant expenditures of money, time, and resources, the new Appendix B requirements will

undoubtedly delay projects from being deemed Data Adequate and thus delay the start of the one-year statutory siting clock.

It is important to note that during the discovery phase, applicants can object to data requests as burdensome, irrelevant, or otherwise inappropriate. Discovery disputes require cooperation between Staff and applicant and are, significantly, ultimately appealed to the assigned hearing officer for dispute resolution if the parties cannot reach agreement. In marked contrast, during the data adequacy phase, CEC Staff has almost unfettered discretion to continue to demand information, and the applicant has little recourse. The first appeal on a data adequacy determination is to the same Staff that is promoting these changes. Thereafter, disputes at the data adequacy stage must be brought to the full commission at a regularly scheduled business meeting. Data adequacy disputes are rarely taken to the full commission and are generally frowned upon by the commissioners who prefer that these issues be resolved outside the public hearing process. Thus, while LS Power appreciates the Staff's well-intentioned efforts to get more information earlier in the process, many of the proposed revisions to Appendix B will result in potentially significant delays in the review of applications for much needed new generation.

LS Power is also concerned about the Staff's proposal to increase the informational requirements. As just one example of the new Appendix B data adequacy proposal of Staff, the new requirements related to cooling water discharges are burdensome. As the Committee is aware, the Morro Bay project was conditionally approved by the Commission on August 2, 2004. However, the Commission's decision has not yet been docketed, and over two years have passed without any action as Morro Bay awaits a hearing by the Regional Board on the federal NPDES permit. The federal Clean Water Act Section 316(a) and 316(b) process is a rigorous, federal process. LS Power is concerned that the Staff's proposed additional Appendix B requirements related to cooling water discharges will further serve to delay projects like Morro Bay that require a NPDES permit. Specifically, the additional requirements in Appendix B Section (13)(B)-(E) are burdensome and not necessary for a determination of data adequacy. Again, if Staff can justify these heightened information requirements on an individual, case-by-case basis, Staff can avail themselves to promulgating Data Requests. As such, where individual, project-specific circumstances require, Staff has a means to seek information. LS power recommends that these new informational requirements, that either duplicate or potentially conflict with Section 316(a) and Section 316(b) requirements, be deleted as data adequacy requirements. We have focused on the new cooling water discharge requirements to make this point, but we believe that for all of the new information requirements, Staff must justify why it needs this information to begin a case (i.e., find a project Data Adequate) as opposed to relying on the usual discovery process.

We are also concerned regarding Section 1751, "Presiding Member's Proposed Decision; Basis." The Staff's proposal can be reasonably read to elevate "public comment" to be the functional equivalent of testimony offered under oath and subject to cross examination. We agree with the comments made at the workshop that the

Committee should reject the call to elevate public comment to equate such comment with testimony given under oath, subject to cross examination. The transcripts of the workshop contain an excellent discussion of why the Commission should rely on the hearing record of a proceeding.<sup>1</sup> This elevation of public comment may not be Staff's intention, but the effect could be to allow members of the public and representatives of other agencies, like the Coastal Commission, to offer "public comment" instead of witnesses who testify under oath, subject to cross-examination. The Commission should reject Staff's proposed revisions to this important section.

LS Power understands that the Committee has directed the Staff to review all parties' comments and offer further revisions to the Commissions siting regulations. We also appreciate the Committee's plans to hold another workshop for public review and comment. Although this process will take some time, we believe that it is important that the Committee take the additional time to consider all perspectives on these important issues.

We look forward to continuing to participate in the Committee's process to improve the Commission's siting process.

October 16, 2006

Respectfully submitted,

LS POWER GENERATION, LLC

By \_\_\_\_\_/s/\_\_\_\_\_

A        u        d        r        a        H        a        r  
 9        8        0        N        i        n        t        h  
 Sacramento, CA 95814  
 ahartmann@lspower.com

---

<sup>1</sup> See the discussion in the workshop hearing transcript beginning at page 31, line 13 continuing on through page 35, line 17.

**Attachment 1**

**LS POWER**  
**Comments on issues discussed at the CEC Workshop**

§1207: Intervenor: LS Power supports the proposal offered by Staff. (Workshop Transcript page 11, line 4 through page thirteen, line 6 (hereafter citations to pages and lines will be as follows: "Tr. at 11:4 to 13:6").

§1213: Official Notice: LS Power supports the proposal to limit the official notice to the CEC and not other agencies. (Tr. at 19:12 to 20:5.)

§1217. Precedent Decisions of the Commission: LS Power believes that this section should be deleted in its entirety. (Tr. at 22:15 to 25:7.)

§1716. Obtaining Information: LS Power supports changing the time for objecting to Data Requests from 10 days to 20 days. (Tr. at 17:22 to 18:18.)

§1720. Reconsideration of Decision or Order: LS Power supports the proposal to limit the grounds for reconsideration to (1) new evidence which could not have been produced at the hearing or (2) legal or factual errors in the decision. (Tr. at 30:7 to 34:11.)

**APPENDIX B**

Completed SIS Required: (b)(2)(E): LS power opposes the addition that a System Impacts Study or a signed SIS agreement. This proposed change is anti-competitive. It gives the IOUs and other Transmission owners complete control over a competitor's AFC process. (See Tr. at 40:11 to 43:11; at 40:11 to 43:11; and at 43:17 to 44:18.)

Cultural Resources: (g)(2): LS Power opposes the proposed additions to the Cultural Resources data adequacy requirements. (Tr. at 50:9 to 62:15.)

Traffic and Transportation: (g)(5)(b): LS Power opposes the new additions to data adequacy related to visible water vapor plumes that may present an aviation hazard. (Tr. at 76:6 to 77:8.)

Visual Resources: (g)(6)(A): LS Power opposes the proposed changes. Staff's "Rationale" states: "Since this information is regularly requested in Discovery, providing this information as part of the application will reduce the Applicant's cost for responding to data requests and will streamline the review of the project by staff." Staff should respect the process by not trying to make "discovery" items "data adequacy" items. Discovery occurs after data adequacy. Staff "regularly" asks for these items during discovery; this suggests that the Staff does not always ask for the information. Making this a data adequacy issue rather than a discovery issue will increase costs and is unnecessary.

Visual Resources: (g)(6)(C): LS Power opposes this provision because it mandates consultation with Staff before selection of KOPs. While it is "good practice" to consult with Staff on KOPs, the consultation should not be a mandate.

Visual Resources: (g)(6)(D): LS Power opposes this section because Staff is requesting very detailed design information. Detail design is, by Commission design, a post-Certification process.

Visual Resources: (g)(6)(E): Staff is requesting additional photo simulations, including photo simulations of proposed "mitigation." Staff is in effect asking Applicants to assume that a visual impact is a "significant impact" and thus the Applicant would have to provide mitigation and expensive photo simulations before the discovery and workshops take place. Put another way, if the Applicant provides no photo simulations of landscaping and Staff disagrees and demands photo simulations for data adequacy, the Staff will effectively be litigating the case and using data adequacy to extract mitigation when the Applicant disagrees with the need for mitigation in the first instance.

Visual Resources: (g)(6)(G): Staff is again assuming a significant impact and a need for "modeling" as part of the data adequacy phase. These issues are not data adequacy issues.

Visual Resources: (g)(6)(H): Staff is again assuming a significant impact and a need for "mitigation" as part of the data adequacy phase. These issues are not data adequacy issues.

(g)(13) Biological Resources: Staff is seeking a tremendous increase in detail for biological resources. For example, the Staff wants information on Biological resources within a 10 mile radius. What is the rationale for this?